United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-1208

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1208

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT PAPA,

Appellant.

BRIEF FOR THE APPELLANT VINCENT PAPA

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THE FACTS

Once in Jeopardy and the Promise made: The Eastern District Case.

On January 24, 1972, Indictment 72 Cr. 88 was filed in the United States District Court for the Eastern District of New York. It charged Vincent Papa, Anthony Possero, Anthony Loria, seventeen additional named individuals, and others "to the Grand Jury unknown," with conspiring to violate the federal narcotics laws between April 1, 1967, and August 6, 1971. In furtherance of the conspiracy fifteen overt acts were alleged. Overt Acts 1, 3, 6, 7, 8, 13 and 15 were alleged to have occurred

in the Bronx, New York; Overt Acts 4 and 5 in New York, New York; and the remainder, Overt Acts 2, 9, 10, 11, 12 and 14, within the Eastern District of New York. The overt acts were alleged to have occurred between April 1, 1967, and July 29, 1971. In addition to the conspiracy, the indictment charged three substantive crimes, but none was alleged to have been committed by Vincent Papa. No Bill of Particulars was ever filed by the Government with regard to this indictment.

The indictment was based primarily upon the grand jury testimony of Angelo Paradiso. Paradiso told the grand jury that he had been paid to deliver heroin to various individuals in New York and Bronx counties in the City of New York by Anthony Loria, and that he obtained this heroin (approximately 50 kilograms from 1967 through January, 1971) from Loria. Loria's alleged "connections" were Vincent Papa, his reputed "partner", Anthony Possero, and Virgil Alessi. (Memorandum and Order of Hon. Charles Brieant, U.S.D.J., S.D.N.Y., April 4, 1975, at 8.)*

The indictment however, never proceeded to trial. On April 17, 1972, it was superseded by 72 Cr. 433, and these two indictments were subsequently consolidated on May 1, 1972 in 72 Cr. 473. The conspiracy count of this indictment added two additional names to the list of co-defendants, expanded the temporal scope of the conspiracy to December 18, 1971, and added nine new overt acts to the fifteen

*References to this Memorandum and Order will hereinafter be designated by the prefix "M" together with a page number.

set forth in the superseded indictment. Three of these, 16, 17, and 18, were alleged to have occurred in Queens County, and the remainder were charged as having occurred "within the Eastern District of New York."

Of far greater significance, however, was the addition of a totally new substantive count. Count Five of the superseding indictment alleged that Vincent Papa, Anthony Possero, Anthony Loria, together with Virgil Alessi and Frank DiAmatto, had engaged in a "continuing criminal enterprise," in violation of 21 U.S.C. §848, an element of which is proof that the defendants had derived substantial income from their illegal narcotics activities. On February 3, 1972, Vincent Papa and Joseph DiNapoli had been arrested in the Bronx in possession of a suitcase containing nearly one million dollars in cash -- the same million dollars ultimately adduced as evidence in the court below. This huge sum of cash -- alleged below to be the ill-gotten pelf of Papa's narcotics activities in the Southern District case -- would also have been adduced as proof that Papa derived "substantial income" from the transactions which formed the predicate of the continuing criminal enterprise count in the Eastern District Indictment. (Affidavit of James O. Druker, November 11, 1974, at p.9, ¶ 18). Indeed it is hard to imagine more dramatic evidence. The million dollar seizure, however, was not submitted to the Eastern District Grand Jury which returned the superseding indictment. (Druker Affidavit, p.2)

The new indictment was based primarily upon the grand jury testimony of an unindicted co-conspirator, Stanton Garland. Based upon its in camera inspection of the grand jury minutes, the court below found the dimensions of the Eastern District conspiracy to be as follows:

"...Stanton Garland, testified that defendant Danny Ranieri sold him five or six kilograms of heroin from March to June of 1971 in Queens County, New York. Sometime in June, 1971, the witness met Vincent Papa and Virgil Alessi, Ranieri's suppliers. From June to October 1971, the witness made approximately eight more purchases of one or two kilograms of heroin each from Ranieri and Rocco Evangelista. Deliveries were made by Ranieri or Evangelista. The last purchase the witness made from Ranieri and Evangelista was on December 18, 1971, after which he was arrested. December 18, 1971, as mentioned above, is the date on which the conspiracy charged in the superseding indictment ended by reason of discovery and arrest. The Grand Jury testimony previously mentioned was given in November 1971 and April 1972.

An organization chart of the heroin distribution business described in the Eastern District indictments would show that Papa was at the head of the business from April of 1967 through December 1971. From April 1967 until June 1971 at the latest, his partner was Anthony Possero. Thereafter, Alessi took over as Papa's partner and Possero was no longer part of the organization.

There were a number of meetings at a bar in Long

Island City known as "Prudenti's" attended by Vincent Papa, Virgil Alessi and lower echelon members of the conspiracy. The narcotics activity of this group was centered at Prudenti's Bar, Loria's home in North Babylon, Long Island, the parking lot of an E.J. Korvette's department store in the Bronx and 1688 Topping Avenue, also in the Bronx.

Papa and whoever was his partner at the time, transferred large quantities of heroin to the next level of suppliers, Loria, Ranieri and Evangelista, who distributed the heroin in similar quantities to the next level, and so down the line, until the heroin reached the street.

By late 1971, the two witnesses who testified before the Easter District Grand Jury had been arrested. One of them told the Grand Jury that in July or August, 1971 Vincent Papa said he believed his telephones were being tapped and he planned to get out of the business. "Getting out" meant ceasing to do business with Alessi and the lower echelon Loria-Evangelista-Ranieri group, because it was becoming apparent that they were under investigation and continued dealings with them would be dangerous. Apparently the successor in interest of Vincent Papa in this business after his withdrawal was Frank D'Amato, see United States v. D'Amato, 493 F.2d 359 (2d Cir. 1974), cited in fn. 26, United States v. Tramunti, __F.2d__(2d Cir. March 7, 1975)."

(M, pp. 9-11)

James O. Druker, a special attorney with the Eastern District Strike Force was place in charge of the investigation and prosecution of Vincent Papa in the Eastern District. (M 8) (Minutes of hearing before the Hon. Charles Brieant, January 16, 1975, hereinafter designated HTr, at 28-29) In March, 1972, plea negotiations commenced between Drucker and counsel for Vincent Papa. (M 25) These negotiations ultimately culminated in an agreement on August 18, 1972 (HTr 32) and, pursuant to the agreement, Papa pleaded guilty to count one of the indictment,the conspiracy count, on September 5, 1972. A number of events occurred between the initiation of these discussions and their ultimate disposition which influenced both the nature and the scope of the agreement.

In July, 1972, Agents of the then Bureau of Narcotics and Dangerous Drugs arrested one Joseph Ragusa as the result of a direct sale purchase of narcotics from him and others. Immediately after his arrest, Ragusa, seeing the proverbial handwriting on the wall, elected to cooperate with the government. On July 17, he made a statement to the government which he repeated the following day before an Eastern District Grand Jury. In substance, Ragusa claimed that Papa was a supplier of large amounts of narcotics that he, Ragusa, had stored or "stashed" for Papa in his apartment in Manhattan. Thus describing himself as Papa's "stash man" Ragusa told the federal authorities that on one occasion he had been entrusted by Papa with some fifty kilograms of heroin. (See pp. 9 and 10 of hearing minutes before the Hon. John F. Dooling, U.S.D.J.,

E.D.N.Y., in United States v. Ragusa, August 24, 1972)

Subsequent events showed Joseph Ragusa to be a bald faced liar engaged in a despicable effort to extricate himself from his own legal difficulties by falsely inculpating Vincent Papa. As the agents who continued to follow leads provided by Ragusa learned, much of what he told them of Papa's alleged narcotics trafficking was demonstrably false, and was divulged only in a desperate effort by Ragusa to slither out from under the watchful eye of federal authorities. He nearly succeeded. In early September, 1972, twelve federal narcotics agents conducted an eight-day, twenty-four hour surveillance based on information provided by Ragusa which was rewarded only by Ragusa's temporarily successful flight from the jurisdiction. (Hearing before the Hon. John F. Dooling, U.S.D.J., E.D.N.Y. in United States v. Ragusa, supra, at 15-16.) His story about a large proposed heroin transaction with Vincent Papa in the fall of 1972 thus turned out to be a complete fabrication. (M 31).

Although Ragusa's efforts to "make a case" against Vincent Papa (M 30) were unknown to Druker on August 18, 1972, when the parties reached an agreed upon disposition of the Papa case, (M 54), Druker was fully apprised of the Ragusa matter prior to the entry of Papa's plea of guilty on September 5. (HTr 51, 55). Indeed, had the Papa case proceeded to trial, the government intended to offer the testimony of Ragusa in support of count five of the indictment, which

accused Papa of engaging in a continuing criminal enterprise. (Druker affidavit, p. 9, ¶18) The complete disintigation of Ragusa's tissue of lies did not occur until after the plea had been entered.

Joseph Ragusa was the government's principal witness in the instant case.

On June 30, 1972, the government's case against Vincent Papa in the Eastern District was dealt a severe, if not fatal blow. Its star witness, Stanton Garland, disappeared from the jurisdiction, and this fact raised the very real possibility that the Papa case might be lost. (HTr 32, 61)

Thus it was that in the late summer of 1972, Mr. Druker and counsel for Papa reached an agreement. Druker, facing the reality that he might be unable to secure the conviction after trial of an individual he believed to be a major narcotics trafficker, and counsel for Papa, whose client faced life imprisonment if convicted after trial, reached an agreement: there would be no trial. The case would be disposed of through a plea bargain. Essentially, that agreement consisted of two parts: first, Papa would plead guilty to count one, the conspiracy count, in satisfaction of the entire indictment. In exchange for this admission of guilt in a less than certain government case, Druker promised to recommend acceptance of the plea as satisfying the indictment (HTr 38) and to recommend that Papa receive the minimum mandatory five-year sentence. (HTr 35) Second, as Papa, by pleading guilty, would place himself in a particularly vulnerable position with respect to

any future prosecution, Druker promised that there would be no such prosecution for any separate part, or "piece" of the conspiracy (HTr 37, 53), or for any overt act encompassed within the conspiracy (HTr 38, 41-42, 53), or as the result of any then pending investigation against Papa in the Eastern District of New York. (HTr 46, 49).

On September 5, 1972, Vincent Papa pleaded guilty to Count one of 72 Cr. 473, in satisfaction of the entire indictment and was sentenced to a term of five years imprisonment. (See minutes of proceedings before Hon. Anthony Travia, U.S.D.J., E.D.N.Y. (September 5, 1972)

Twice in Jeopardy and the Promise Broken: The Instant Indictment

Vincent Papa together with five others was charged in the present indictment, 74 Cr. 251,* with violations of the federal narcotics laws. Count 1 charged Papa with conspiring to violate the federal narcotics laws from December 1, 1967, to and including the filing of the indictment, March 18, 1974. Vincent Papa was accused of conspiring with Victor Euphemia, Anthony Stanzione, Jack Locorrieri, Vincent Papa, Jr., John Doe, a/k/a Petey Box or Peter Giamarino and thirty co-conspirators, including Joseph Ragusa, Joseph DiNapoli and Anthony Possero. In furtherance of the alleged conspiracy the indictment recited nine overt acts occuring between January of 1968 and March of 1972. All of the overt acts were alleged to have occurred in New York, Bronx and Queens Counties in the City of New York. Further, Overt Act 8 alleged the possession by

* 74 Cr. 251 was ultimately superseded by 74 Cr. 1082, to reflect minor changes.

Vincent Papa on February 3, 1972 of approximately One Million Dollars ($1,000,000.00) in the vicinity of 1908 Bronxdale Avenue, Bronx, New York. Count 2 of this indictment charged Vincent Papa and Anthony Stanzione with the possession with intent to distribute of some 160 pounds of heroin hydrochloride. This possession was alleged to have occurred on February 14, 1972, and to have occurred in the vicinity of 522 West 188th Street, New York, New York, according to a bill of particulars filed by the government on August 30, 1974.

Appellant's pre-trial motions to dismiss on due process and double jeopardy grounds were not decided until after the conviction. In its memorandum and order denying the relief sought through these motions, the court below made post-trial findings of fact which may be summarized as follows:

Unindicted co-conspirator Joseph Ragusa testified that he had been hired sometime in late 1969 or early 1970, as a driver-dispatcher for Ditmars Private Car Service, owned by the defendant, Jack Locorrieri. Ragusa first met Papa there, a short time after he had been hired. Papa and the defendant Victor Euphemia were friends of Locorrieri who frequented the car service. (M 13)

Within a few months, Ragusa became a "stash man" for Locorrieri, storing quantities of heroin in his Manhattan apartment. Locorrieri told Ragusa that the latter should follow instructions from Victor Euphemia if Locorrieri were not available (M 13)

From the Spring through the Fall of 1970, Ragusa began making deliveries of heroin to Mrs. Joan Moreland from the supplies he stashed for Locorrieri, and, from time to time, carried money from Mrs. Moreland to Locorrieri. (M 13-14)

Sometime in 1971, Jack Locorrieri disappeared. Ragusa, however, continued to make deliveries to Mrs. Moreland from the heroin remaining in his "stash", and embezzled some of the money he received from her. (M 14)

After Locorrieri's disappearance, Euphemia asked Ragusa to continue making deliveries. At about the same time, according to Ragusa, he was approached by Vincent Papa who asked for the money Ragusa had collected from Mrs. Moreland and had embezzled from Locorrieri. (M15)

Mrs. Moreland, also a co-conspirator, testified that she had been engaged in the purchase of heroin from Euphemia and Anthony Stanzione since 1967. (M 15) In late 1969, she met Locorrieri through Euphemia, and received deliveries from Locorrieri until Ragusa took over in 1970. (M 16) Mrs. Moreland never met Vincent Papa. Once, in the summer of 1971, when she failed to make an expected payment to Euphemia, she testified that the latter said, "you got to get it up because if you don't have it, Vinnie will have my head." (M 16) She did not know "Vinnie's"last name. (M 16)

By June of 1972, Mrs Moreland had been arrested, by state authorities, and agreed to cooperate with them by "setting up" Ragusa. (M 17) Ragusa stated to her that he would need permission from "Vinnie" before he could begin dealing

with her on a consignment basis. Mrs. Moreland believed "Vinnie" was Ragusa's boss. (M 17)

In January, 1972, after demanding that Ragusa repay the money he had received from Moreland but not delivered to Locorrieri, Papa suggested that Ragusa could work off the debt by storing heroin for Papa. Ragusa agreed. (M 18)

Papa introduced Ragusa to Anthony Stanzione, and told him that Stanzione was to have access to the heroin Ragusa stashed for Papa at any time. Ragusa then obtained two suitcases of heroin from Stanzione, weighing approximately 160 pounds. Some of this, Ragusa stole; the remainder was sold to an under cover agent (M 18)

On March 16, 1972, Ragusa, together with George Hamilton, negotiated a direct sale of heroin to an undercover federal narcotics agent, Joseph Salvemini. (Trial transcript, at 778) The heroin was delivered to Salvemini by Anthony Baiardi. (Tr. 779). At trial, the defense endeavored to elicit from Salvemini the substance of a conversation he had had with Baiardi in which Baiardi stated, on April 5, 1972, that Hamilton and Ragusa had traveled to Virginia to obtain the heroin which they had sold to Salvemini. The court sustained a government objection to the question on hearsay grounds. (Tr. 801-04)

On July 17, 1972 Ragusa was arrested. (M 19)

On February 3, 1972, Vincent Papa and Joseph DiNapoli were arrested in the Bronx in possession of a suitcase containing nearly one million dollars in cash. The court below denied a pre-trial motion to suppress, and, over additional

objections, admitted the money as evidence.

Norman Young testified that in 1970 & 1971, he laundered millions of dollars for Papa and unindicted co-conspirator Anthony Possero through a White Plains bank. This "laundering" process consisted of the exchange of small bills for large bills. (M 22) Young did not know what business endeavor was generating this cash, nor did he know Joseph DiNapoli. (M 22)

On February 9, 1975, Papa was convicted under counts one and two of the indictment. He was sentenced on May 14, 1975 to a total term of imprisonment of twenty years, to run concurrently with the sentence he is currently serving, and a fine totalling $35,000.00. From the judgment of conviction, Vincent Papa appeals.

POINT I

DUE PROCESS REQUIRES REVERSAL AND DISMISSAL OF THE INDICTMENT BECAUSE TRIAL THEREON PERMITTED REPUDIATION OF A PROMISE BY THE GOVERNMENT AS PART OF AN EARLIER PLEA BARGAIN

In September 1972 Vincent Papa pleaded guilty to conspiracy to violate the narcotics laws, in satisfaction of a then pending indictment, 72 Cr. 473, superseding, 72 Cr. 88, and was sentenced to a prison term of five years. The entry of the plea of guilty was preceded by negotiations between Papa's counsel and James O. Druker, then Special Attorney in the Eastern District Strike Force Office. It was, of course, of particular concern to Papa's counsel that his client not be the object of future related prosecutions after entering a plea of guilty to the indictment, and accordingly, counsel sought to learn from Mr. Druker whether there were any pending investigations against Papa. Mr. Druker indicated he knew of none. Further, on behalf of the government, Druker promised that there would be no further prosecution of Papa for crimes encompassed within the conspiracy to which he was about to plead guilty or on the basis of information then in his possession.

Nor was this a nudum pactum. As the prosecutor acknowledged on the record at Papa's sentencing, the case against him was weak. Conviction after trial was not highly probable. Thus, it is not as if the government were hoodwinked into a bad agreement. Both sides received something of value and gave up something of value. The government secured the conviction and

punishment of an individual it believed to be a major figure in narcotics trafficking, but gave up the right to seek future indictments based upon the course of conduct which had led to the first indictment. Vincent Papa, in turn, relinquished that panoply of rights incident to a criminal trial before a jury which he might well have won, in exchange for the government's promise not to bring a future prosecution arising out of the activities which had led to the Eastern District indictment. There was, therefore, good and sufficient consideration on both sides. In good faith reliance upon the binding nature of this agreement, Papa pleaded guilty to the conspiracy count of the indictment, in satisfaction of the entire indictment, on September 5, 1972.

Papa, of course, to his prejudice, has kept his end of the bargain. He has served nearly three years of his sentence. But the government has not honored its promise. The instant prosecution flies in the face of the pre-pleading agreement. By its own terms, it expressly repudiates the representations made by the government, through Druker, in the fall of 1972.

Indeed, the court below found that had venue for the instant case been laid in the Eastern, rather than the Southern District of New York, due process would have required dismissal of the indictment. (M 28) For Papa had been promised that his plea of guilty in the Eastern District case would satisfy all related investigations of him; and counsel for the

government understood "related" to mean all outstanding investigations of Papa. At the time of Papa's plea, counsel for the government was aware of the information provided by Joseph Ragusa to federal authorities in the Eastern District, and to an Eastern District Grand Jury. That same information ultimately lead to the instant prosecution of Papa. Nevertheless, the court below found that the promises of the government were binding only in the Eastern District, and thus denied the defendant's pre-trial motion to dismiss on due process grounds.

The government argued vigorously below that the agreement, by its own express terms, bound only the Eastern District United States Attorney's Office, and specifically exempted from its ambit the United States Attorney's Office for the Southern District of New York. But the record does not support this contention, and the court below expressly eschewed such a finding.

A review of the record as a whole reveals that reference by the parties to "Eastern District investigations" related only to the substantive scope of the agreement, and were not intended to place territorial limits upon its coverage. At no time did the parties to the agreement contemplate its reach would not extend into Manhattan. It was clear to both sides that their negotiations were concerned with the substance of future prosecutions, not their venue.

Thus, the August 18 conference between Druker and counsel for Papa began with the expression of concern on

the part of Wallace Musoff, Esq., one of Papa's lawyers, that the entry of a plea of guilty would satisfy all outstanding investigations,

> because if it didn't then he wouldn't be in a position to adequately defend himself against future charges once he was incarcerated.
>
> HTr 8.

Accordingly, on behalf of the government, Druker promised that there would be no future prosecution of Papa based in whole or in part upon the conspiracy charged in count one of the superseding Eastern District indictment, nor upon any other then-pending Eastern District investigation of Papa.* It was in this context that the parties discussed the seizure of the million dollar suitcase from Papa and Joseph DiNapoli in the Bronx the preceeding February. Druker indicated that he knew no more about than did counsel for Papa. It is clear that the question was asked solely in order to learn whether that seizure was related to cases then pending against Papa in the Eastern District; accordingly, it is far-fetched to maintain that that aspect of the conversation indicated that the parties intended to limit the territorial reach of the agreement subsequently nailed down. At best, viewed in the light most favorable to the government, the agreement failed to resolve the geographical question in express terms.

*This clearly embraced the matters disclosed by Joseph Ragusa, and which ultimately formed the predicate of the present case, first because Druker, acting on behalf of the United States Attorney, was bound to the knowledge of that office, and the Ragusa matter had been under investigation since July 17; and second, Druker was actually aware of the existence of the Ragusa revelations prior to the entry of Papa's plea, but failed to bring this fact to the attention of counsel for Papa for security reasons.

The resolution of this issue, however, should not turn, as it did in the court below, on nice hyper-technical questions of the express, apparent, or implied authority of one United States Attorney's Office to bind another nor should it be determined by the unreal fiction that the United States Department of Justice consists of ninety-six semi-sovereign feifdoms. Surely the defendant was entitled to rely upon the belief that the agreement which resulted in his plea was between him and the United States Government, as indeed he did to his prejudice. Just as surely, the Due Process clause of the Fifth Amendment binds the government to honor it.

As the Supreme Court has consistently and repeatedly stated, plea bargaining is an essential element of the criminal justice system. See, e.g., Santobello v. New York, 404 U.S. 257, 260, 261 (1971); Brady v. United States, 397 U.S. 742 (1970). In order to preserve the integrity of this mode of disposing of criminal cases, however, such agreements must be honored and the promises underlying them must be kept. The Santobello court held:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. (Emphasis added)
>
> Santobello v. New York, supra, at 262

It does not matter, for these purposes, whether a promise made by one prosecutor is broken by another prosecutor

in the same office, as was the case in Santobello, or whether the promise is broken by a different prosecutorial agency, as is the case here. A citizen has the right to expect fair dealing from the government, "and this entails. . .treating the government as a unit rather than an amalgam of separate entities." S & E Contractors, Inc. v. United States, 406 U.S. 1, 10 (1972). Plaintiff in every federal criminal prosecution is the United States of America, not the separate United States Attorney's Offices within the Department of Justice. Accordingly, promises made by one United States Attorney's Office as an agency of the government, are binding on the government as a whole. As the Supreme Court held in Giglio v. United States, 405 U.S. 150, 154 (1972):

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.

Faced with the very issue presented here, on facts strikingly similar to those of the instant case, the Fourth Circuit Court of Appeals, sitting en banc, expressly rejected the government's argument that promises made by one United States Attorney's Office are not binding upon any other, and held that an indictment must be dismissed it if arises out of facts upon which the government promised no prosecution would be based.

In United States v. Carter, 454 F.2d 426 (4th Cir. 1972) the defendant had pleaded guilty, in the District of

Columbia, to the possession of stolen Treasury checks. In exchange for the plea and the defendant's cooperation with the government, the defendant was promised that he would not be further prosecuted in connection with the stolen checks. Some time later, the defendant was indicted in the Eastern District of Virginia for forgery and conspiracy. That prosecution involved stolen Treasury checks, some of which had been the subject of the District of Columbia case. The defendant moved to dismiss the indictment on the ground that it violated the District of Columbia agreement. The District Court denied the motion without a hearing. The Court of Appeals reversed defendant's subsequent conviction and remanded for a hearing on the question of whether in fact such an agreement had been made, holding that if such an agreement could be shown, the indictment would have to be dismissed.

Finding that an agreement made by one federal prosecutor is binding upon all others, the court held:

> The United States government is the United States government throughout all of the states and districts. If the United States government in the District of Columbia, acting through one of its apparently authorized agents, promised that the sole prosecution against defendant would be the misdemeanor charge in that jurisdiction, and defendant relied on the promise to his prejudice--facts which must be proved in the plenary hearing if the indictment is to be dismissed--we will not permit the United States government in the Eastern District of Virginia to breach the promise.

United States v. Carter, supra, at 428

The same court went on to say:

> If there be fear than an United States Attorney may unreasonably bargain away the government's right and duty to prosecute, the solution lies in the administrative controls which the Attorney General of the United States may promulgate to

> regulate and control the conduct of cases by the United States Attorneys and their assistants. The solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another United States Attorney and thus to visit a sixteen year sentence on a defendant in violation of a bargain he fully performed. There is more at stake than just the liberty of this defendant. At stake is the honor of the government and public confidence of the fair administration of justice in a federal scheme of government. Id.

It is of significance to note that the Court of Appeals in Carter found that a promise by the government not to prosecute for crimes arising out of the defendant's possession of stolen checks--essentially identical with the government's promise here not to prosecute for crimes encompassed within the Eastern District conspiracy and not to base any future prosecution on information already in hand--was, if in fact made, breached by an indictment not charging possession of stolen checks. It thus did not matter, in Carter, that the gravemen of the second prosecution consisted of conspiracy and forgery, not possession. What did matter was that some of the same checks involved in the first case were involved in the second. Similarly here, the fact that the present indictment may have been predicated in part upon information discovered after the plea negotiations between the government and Papa's counsel is of no moment. What counts is that it was based upon information in the possession of the government at the time the agreement was made.*

*Upon remand to the District Court, a full evidentiary hearing was held. The District Court found that the agreement was an agreement only to dispose of a specific prosecution in the District of Columbia in return for the defnedant's plea to a misdemeanor, and further, that the Assistant United States Attorney who made that agreement was aware at the time of possible other prosecutions in other districts. Here, in complete contrast, Mr. Druker knew at the time he made

Alleging a similar promise, the defendant, in United States v. Paiva, 294 F.Supp 742 (D.D.C. 1969) moved successfully to dismiss an indictment charging him with forging United States Savings Bonds. During thependency of the investigation which preceded the indictment, the defendant had been in jail on other charges. At the time he was facing prosecution for interstate transportation of stolen Treasury checks, forgery, two narcotics charges, two other felonies, and a host of other crimes. In order to dispose of the cases in an expeditious fashion, the government agreed to accept a plea of guilty to four of the felonies in exchange for its promise not to prosecute the defendant for forging the bonds, or any other paper before a certain date, if the defendant would cooperate in administratively closing the case against him. The agreement included a caveat that the defendant would not be required to implicate others. Nevertheless, the Secret Service continually pressed him to do so, and when he refused, advised the United States Attorney's Office that the defendant was "not cooperating". The United States Attorney then authorized prosecution for the forgery and, some ten months later, the defendant was indicted.

The court summarily rejected the government's theory that it was not bound by the promise, as well as its argument that specific performance of the bargain would violate

*his commitment to Papa that the case he agreed would never be prosecuted involved acts and transactions occurring within the Southern District as well. Here, as well, the promise was not limited to the satisfaction of a specific prosecution in a specific district. The unreported District Court Memorandum Opinion was affirmed without opinion by the Fourth Circuit Court of Appeals, 490 F.2d 1407 (4th Cir. 1974).

the doctrine of separation of powers. Noting that the defendant had already commenced service of the sentence imposed after his plea of guilty, as has Papa in the present case, the court granted the only relief appropriate: it held the government to its promise, and dismissed the indictment.

> [What] is held here is that if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision to do so will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed. In effect, what is held here is that when the U.S.Attorney enters into an agreement with the defendant which involves the use of the judicial process, his responsibility transcends the executive function. . .
>
> [For the court] not to act would create a void leaving the defendant helpless, the court responsible.
>
> > "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." [Sherman v. United States, 356 U.S. 369, 380 (1958) (Concurring opinion of Frankfurter, J.)]

United States v. Paiva, supra, at 747.

In the Ninth Circuit, similar results obtained under similar facts. In United States v. Hallam, 472 F.2d 169 (9th Cir. 1973), defendant pleaded guilty to the second count of a two-count indictment charging possession of an unregistered weapon and possession of a weapon by a felon. According to the plea bargain, the plea was entered to the second count and the first count was dismissed.

Some time later, however, the government became concerned about the sufficiency of the second count of the indictment to state an offense. Fearing that the defendant might bring a habeas corpus application attacking his conviction after the statute of limitations had run on the first count, the government sought relief. The District Court obliged. It vacated the guilty plea, dismissed the count to which it was entered and thus permitted the government to re-indict the defendant on the first count. In a brief per curiam opinion, the Court of Appeals held this to be manifestly improper:

> Judgment having been entered upon Count II it did not lie with the government unilaterally to seek to set it aside over the objections of the appellant. It is clear from Santobello. . . that due respect for the integrity of plea bargains demands that once a defendant has carried out his part of the bargain, the Government must fulfill its part. Here, this required that the dismissal of Count I of the original indictment must stand.

United States v. Hallam, supra, at 169

And in an analogous situation, the Court did not hesitate to hold that a promise by the government not to prosecute made as part of a plea bargain, would be judicially enforced. See United States v. De Sena, 490 F.2d 692 (2d Cir. 1973).

As against this authority, the government, and the court below, relied upon the District Court opinion in United States v. Boulier, 359 F.Supp. 165 (E.D.N.Y. 1972) to support the proposition that it was "settled law" in the Eastern District of New York, at the time the agreement was

made, that prosecutorial promises are limited to the district in which they are made. This is simply wrong.*

In Boulier, aff'd sub nom, United States v. Nathan, 476 F.2d 456 (2d Cir. 1973), separate indictments were pending in the Eastern District of New York and the Southern District of Florida. In exchange for the defendant's offer to cooperate and plead guilty to a superseding information in Florida, an Assistant United States Attorney there agreed that the Florida indictment would be dismissed and represented to counsel for the defendant that the United States Attorney's Office in the Eastern District of New York would not oppose a motion to dismiss the indictment there pending on double jeopardy grounds. The defendant, however, did not cooperate, and this failure of consideration, the court quite correctly held, vitiated the agreement. Moreover, the court noted that under the rules promulgated pursuant to 28 U.S.C. § 519, a United States Attorney in one district could not bind another

* The court below made much of the fact that Papa was represented by skilled and able counsel in the plea negotiations, who were "[U]ndoubtedly [aware of] Judge Mishler's clear enunciation of the guidelines in Boulier...No suggestion to the contrary has been made before me." (M 35) But Boulier was not decided until August 10, 1972 a mere eight days before the plea agreement was consummated. The text of the opinion never appeared in the New York Law Journal, and was not published in the advance sheets of the Federal Supplement until August 27, 1973. Counsel for Papa may well have been "capable and competent;" they were not, however, clairvoyant.

to dismiss a then-pending indictment. Indeed, the court also noted (see n. 11, at 171) that a promise to dismiss an indictment invades the province of the court, since only the court can order the dismissal of an indictment. It should also be noted that this Court declined the opportunity to agree with this analysis, and found the defendant's failure to keep his end of the bargain dispositive.

But, in any event, the appellant here does not take issue with Judge Mishler's dictum in Boulier to the effect that a United States Attorney in one District may not, through his promises, bind another United States Attorney and a federal District Court in another District to dismiss an outstanding indictment. The issue here is quite different. The appellant in the instant case was not promised that an indictment already pending against him in another district would be dismissed. He was told that the government would not bring the instant prosecution. Boulier's promise necessarily, at the time it was made, attempted to bind the court, whereas the promise made to Vincent Papa bound only the promisor, the United States Government. Moreover, the promise made to Papa is the kind of promise prosecutors frequently make. In United States v. Paiva, supra, at 747, the court wrote:

> It is not an infringement on the nearly unlimited discretion of the United States Attorney to determine, for instance, whether as here, to enter into agreements with potential defendants, how to charge, whether to seek indictment and in general to prepare his cases for trial.

Thus, the promise Druker made to Papa was in fact within his authority as an attorney for the Department of Justice.* Accordingly, Carter, Paiva, Hallam. Giglio and Santobello control the instant case, not Boulier. The government promised Vincent Papa that he would not be the object of a future prosecution based on information in its possession in 1972, nor for any crime encompassed within the conspiracy for which he had been indicted. Papa, in turn, agreed to plead guilty and accept his punishment. He has kept his part of the bargain. The government must now be held to honor its half of the agreement.

*In proceedings below, the government relied upon Hunter v. United States, 405 F.2d 1187 (9th Cir. 1969). First, this case was decided before the Supreme Court's opinion in Santobello v. New York, 405 U.S. 257 (1971). Second, Hunter deals with a promise to the defendant made by law enforcement agents, not an attorney for the government. This is a distinction with a difference. See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics and Dangerous Drugs, 456 F.2d 1339, 1345-47 (2d Cir. 1972).

POINT II

APPELLANT'S TRIAL ON THE INSTANT INDICTMENT VIOLATED HIS RIGHT NOT TO BE TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE.

A. PRIOR JEOPARDY ON THE EASTERN DISTRICT CASE: THE CONTINUING CRIMINAL ENTERPRISE COUNT

Count five of indictment 72 Cr. 473 -- hereinafter, the Eastern District indictment -- charged Vincent Papa and Anthony Possero, together with three other individuals with engaging in a continuing criminal enterprise, in violation of 21 U.S.C § 848. Papa pleaded guilty to count one of the indictment in satisfaction of the whole. His plea, accepted in this form, placed him in jeopardy on each count of the indictment naming him as defendant. See e.g., United States v. Hallam, 472 F.2d 168 (9th Cir. 1973), United States v. Dickerson, 168 F.Supp. 899 (D.D.C. 1959), rev'd on other grounds, 271 F.2d 487 (D.C. Cir. 1959), Rivers v. Lucas, 477 F.2d 199 (6th Cir. 1969).

Because the Eastern District case was disposed of through a plea of guilty, there is no trial record and there is no Bill of Particulars from which to articulate the full scope of the government's case on count five of the Eastern District indictment. However, the government's admission in its affidavit in opposition to Papa's motion to dismiss on double jeopardy grounds with respect to the proof it expected to tender

on that count of the indictment more than amply demonstrates that both the conspiracy and the substantive offenses charged in the case now before this court were wholly absorbed within and indeed constituted the necessary elements of the continuing criminal enterprise charged in the Eastern District indictment. Papa's prior jeopardy on that offense absolutely bars his prosecution here.

Section 848 of Title 21 is the product of Congressional compromise. It had its genesis in the Department of Justice and first assumed legislative form as part of parallel bills under consideration in the Senate and the House. The House version, with some modification, ultimately became the Comprehensive Drug Abuse Prevention and Control Act of 1970.

In its original form, as section 509 of the Senate bill, and section 408 of the ultimately enacted House version, the continuing criminal enterprise provision was designed not to create a new offense but to be employed as a pure sentencing statute. As originally drafted, the legislation would have provided that, after conviction, the government had the burden of proving, by a preponderance of the evidence, that the defendant had engaged in a series of violations of the narcotics laws in concert with five or more persons, or had derived substantial income from such activity. Possession of substantial resources was presumptive evidence of the derivation of such resources from illegal narcotics activities; the burden was placed upon the defendant to demonstrate that any substantial income did

not derive from violations of the narcotics laws.

Even the Justice Department, however, harbored doubts about the constitutionality of such a procedure. The House Interstate and Foreign Commerce Committee, before which this section of the legislation was pending, adopted an amendment proposed by Representative John Dingell designed to convert this sentencing procedure into a substantive offense and thus provide a defendant accused of having participated in a continuing criminal enterprise the full panoply of rights incident to a criminal trial.

> The amendment offered by Mr. Dingell which was adopted by the full committee corrected...[the constitutional] defects [contained in the original legislation]. Instead of providing a postconviction presentencing procedure, it made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court.
>
> 2 U.S. Code Congressional and Administrative News, 90th Congress, 1970, at 4651.

The elements of continuing criminal enterprise, however, remained essentially the same, and this accounts for the hybrid appearance of the statute: It is one of those rare offenses which includes among its elements, the commission of still other offenses.

Thus, in order to have convicted Papa under count five of the Eastern District indictment, the government would have been required to prove:

1) that Papa committed a felonious violation of the narcotics laws;

2) that such violation was part of a "continuing series" of such violations -- that is, one of at least three or more related offenses. United States v. Collier, 358 F.Supp. 1351,1355 (E.D.Mich. 1973)

3) that with respect to each of these offenses, Papa "acted in concert" with five or more other persons. The phrase, "acted in concert" was plainly intended to be synonomous with "conspired." The Report of the Senate Judiciary Committee which accompanied the original Senate legislation through that chamber defined continuing criminal enterprise in part as requiring a finding by the court that "the defendant acted in concert with or conspired with at least five or more other persons..."(Emphasis added) Moreover, as this court once held,

> Section 848...goes to the business of trafficking in the prohibited drugs on a continuing, serious, widespread...basis.
>
> United States v. Manfredi, 488 F.2d 588, 602 (2d Cir. 1973)

This court has on more than one occasion used virtually identical language to describe the essence of large-scale criminal conspiracies to violate the narcotics laws. See, e.g., United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), and cases cited therein.

4) that as to the individuals with whom Papa conspired, he occupied the position of organizer, supervisor or manager; and

5) That Papa derived substantial income from this illicit business.

Thus, proof that Papa conspired together with five or more other persons and committed at least three related felonious violations of the narcotics laws would have been necessary to convict him. Absent proof of such a conspiracy, and proof of crimes attributable directly or vicariously to Papa, he could not have been convicted. But as the government's own admission amply demonstrates, these included the conspiracy and substantive offense charged and proved against Papa below. Thus, the crimescharged in the present case were also an underlying predicate of the Eastern District charge of continuing criminal enterprise. The elements of the latter included -- and thus wholly absorbed -- the former. The evidence which sustained the conspiracy and substantive counts against Papa in the court below would have been sufficient to have sustained the charge of continuing criminal enterprise in the Eastern District indictment.

The government successfully contended below that the $1,000,000.00 possessed by Vincent Papa in February 1972 was generated by the activities of the co-conspirators in the present case. Possession of that $1,000,000.00 was alleged as an overt act, undertaken in the course of and in furtherance of the aims of the conspiracy for participation in which Papa has now been convicted. But the government concedes that the same $1,000,000.00 was to have been offered as evidence of the substantial profits derived from Papa's

participation in the continuing criminal enterprise charged in count five of the Eastern District case. It concedes that the same $1,000,000.00 worth of narcotics activity, which was the subject of the present prosecution, was also the subject of Count Five of the Eastern District case.* Thus, the massive narcotics merchandising scheme upon which had been predicated the charge of continuing criminal enterprise in the Eastern District embraced within its ambit the conspiracy which was the subject of this prosecution.

The government conceded below, moreover, that it intended to offer the testimony of Joseph Ragusa in support of the continuing criminal enterprise count in the Eastern District case. The affidavit of James Druker states:

> I did consider making an offer of proof with regard to the continuing criminal enterprise count, Count Five of the consolidated Indictment with regard to Ragusa's statements in hopes that it would be admitted for the purpose of showing the immense dimension of Papa's narcotics activity.

Affidavit of James Druker, at 9

Obviously the government considered Ragusa's testimony relevant in establishing Vincent Papa's participation in the continuing criminal enterprise. Surely it would not in good faith have made an offer of proof regarding Ragusa

*The government's expressions of concern with respect to the admissibility of this kind of evidence is passingly strange in view of its oft-repeated and successfully-argued contention to the contrary. See e.g. Lutwak v. United States, 344 U.S. 604 (1953); United States v. Bennett, 409 F.2d 888(2d Cir. 1969); United States v. Nathan, 476 F.2d 456 (2d Cir. 1973).

if it believed that the subject of his testimony concerned narcotics activity unrelated to that enterprise.

In his statement to Drug Enforcement Administration agents on July 17,1972, and his testimony before an Eastern District grand jury the following day, Ragusa sketched the outlines of the same large-scale narcotics distributing network established by the proof below, involving, as core participants, Vincent Papa, and Jack Loccoreri. He testified there, as here, of how he claimed to have met Vincent Papa through Jack Loccoreri at Ditmars Car Service in Astoria, Queens in 1969 or 1970, well within the time frames of both the conspiracy charged in the present case and the Eastern District continuing criminal enterprise.* He described his role as a distributor of heroin for Loccoreri and his continuing occupation as a "stash man" for Vincent Papa. His testimony thus linked Loccoreri, Papa and himself together in a narcotics conspiracy, the dimensions of which were identical in all relevant respects to the conspiracy charged in the present indictment. The principals, the centers of distribution, and the time frames are the same. It is thus clear that the conspiracy charged in the instant case was part and parcel of the continuing criminal enterprise charged in Count Five of the Eastern District indictment. It is equally clear that the substantive charge of possession of 160 pounds of heroin hydrochloride, for which Papa was

*In his affidavit Mr. Druker states that he was concerned about the admissibility of Ragusa's testimony because of its time frame. This is odd in view of the fact that Ragusa's statements describe a continuing series of narcotics-related activities spanning several years, most of which occurred within the temporal framework of the Eastern District indictment.

convicted below, was also part of that enterprise. For it was through the testimony of Ragusa, and Ragusa alone, that the government established Papa's guilt under count two of the indictment herein. And as this possession occurred well before Ragusa's arrest in the Eastern District, his testimony linking Papa with that 160 pound suitcase which Ragusa obtained from Anthony Stanzione would undoubtedly have formed part of his testimony on count five of the Eastern District indictment had it proceeded to trial.

But proof that Papa participated in the conspiracy charged in count one and possessed, if only vicariously, the heroin charged in count two of the indictment in this case would not have been merely evidence of Papa's guilt of engaging in a continuing criminal enterprise; rather, these crimes were among the necessary elements of that offense. And the law is clear that when one has been in jeopardy for one offense which necessarily includes all of the elements of other offenses, as the Eastern District continuing criminal enterprise included the offenses charged against Papa in the present case, a subsequent prosecution for the latter is barred by the Double Jeopardy Clause of the Fifth Amendment.

The rule that conviction for any offense which includes all the elements of some other offense bars subsequent prosecution for the latter is a corollary to the traditional double jeopardy doctrine that two offenses are the same if the evidence sufficient to convict in one would have been sufficient to convict in the other:

> [T]he test to be applied to determine whether there are two offenses or only one, is whether each [of two] separate statutory violation. . .requires proof of an additional fact which the other does not.
>
> Blockburger v. United States, 284 U.S. 299, 304 (1932)

Thus, for example, under this corollary, a defendant convicted of felony murder could not be re-prosecuted for commission of the underlying felony, since the evidence necessary to convict for the murder includes proof of each and every element of the predicate felony. See e.g., Coole v. Henderson, 350 F. Supp. 1010 (W.D. La. 1972). First recognized in American law in Ex Parte Nielsen, 131 U.S. 176 (1889), the rule has been repeatedly invoked in the Second Circuit to void multiple convictions, and hence, double punishment, in circumstances where a defendant is convicted of two separate statutory violations, one of which wholly incorporates all of the elements of the other. Thus here, the rule stands as a bar to the present prosecution of Papa for offenses predicated upon the same activities which gave rise to the charge of continuing criminal enterprise in the Eastern District because the latter includes all of the elements of the former.

In Ex Parte Nielsen, supra, Congress, in an effort to suppress polygamy in what was then the Territory of Utah, passed a series of laws prohibiting cohabitation with more than one woman and punishing certain polygamous relationships as adultery. Nielsen had married and was cohabiting with two women. He was indicted for unlawful cohabitation

occurring between October 15, 1885 and May 13, 1888, and adultery occurring on May 14, 1888. He pleaded guilty to cohabitation and after serving his sentence, pleaded not guilty to adultery on the ground that the adultery prosecution was barred by his prior conviction. The District Court disagreed and following his second conviction, Nielsen sought habeas corpus relief. The Supreme Court reversed the conviction and ordered the writ issued.

The Court found that each and every element, or "incident" of adultery was included in the crime of unlawful cohabitation. Although the indictments alleged that the adultery did not occur until the day after the unlawful cohabitation was complete, the Court concluded that unlawful cohabitation, by its nature a continuing offense, included the adultery alleged:

> Living together as man and wife is what we decide . . .was meant by unlawful cohabitation under the statute. Of course, that includes sexual intercourse. And this was the integral part of the adultery charged in the second indictment, and was covered by and included in the first indictment and conviction. The case was the same as if the first indictment had in terms laid the unlawful cohabitation for the whole period preceding the finding of the indictment. The conviction on that indictment was in law a conviction of a crime which was continuous, extending over the whole period, including the time when the adultery was alleged to have been committed. The petitioner's sentence, and the punishment he underwent, on the first indictment, was for that entire continuous crime.

Ex Parte Nielsen, supra at

Thus, the Court held that the Double Jeopardy

Clause of the Fifth Amendment absolutely barred the adultery prosecution:

> [I]t seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

Id. at____*

The present case parallels Nielsen. The fact that the Eastern District indictment alleged that the continuing criminal enterprise "ended" in December 1971, while the conspiracy charged in the present case was alleged to have extended beyond that date is therefore of no significance. What is of significance is that the government intended to offer in support of the charge of continuing criminal enterprise the same $1,000,000.00 and the same Ragusa testimony it did in fact offer in support of the crimes alleged here. It is clear, therefore, that the predicate of the continuing criminal enterprise included all of the elements of the conspiracy and substantive count charged here. And as Nielsen demonstrates, Papa's jeopardy on the former bars his prosecution for the latter.

The Nielsen rule has been repeatedly and consistently applied in the Second Circuit to void multiple convictions where the elements of one offense are wholly absorbed within another for which the defendant has been convicted. See

*"Incidents" in this context does not mean "episodes" or "events". Rather, the reference to "incidents" should be understood as a reference to what is meant by "elements" in contemporary usage. Cain v. United States, 19 F.2d 472, 475 (8th Cir. 1927).

e.g., Schroeder v. United States, 7 F.2d 60 (2d Cir. 1925); United States v. Levison, 54 F.2d 363 (2d Cir. 1931); Schechter v. United States, 7 F.2d 881 (2d Cir. 1925); United States v. Wexler, 79 F.2d 526 (2d. Cir. 1935); United States v. Crushiata, 59 F.2d 1007 (2d Cir. 1932); Rouda v. United States, 10 F.2d 916 (2d Cir. 1926).

It is clear, moreover, that the rule applies with equal force when all of the elements of conspiracy are included in a substantive offense for which the defendant has been convicted. Westfall v. United States, 20 F.2d 604,606 (6th Cir. 1927). Indeed, in Pinkerton v. United States, 328 U.S. 640 (1946), where the Supreme Court found, as a general proposition, that conspiracy and substantive crimes were discreet offenses, the Court carved out two exceptions to that rule, one of which incorporates the Nielsen doctrine:

> There are of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime.
>
> Pinkerton v. United States, supra at 643 (emphasis added)

There are, of course, few substantive federal offenses which necessarily include all of the elements of conspiracy, and this accounts for the paucity of case authority applying the Nielsen-Pinkerton rule to conspiracy cases. However, an apt, if limited illustration of the point is to be found in those cases involving indictments charging conspiracy under 18 U.S.C. § 371 as well as a substantive

violation of one of the federal anti-gambling statutes, 18 U.S.C. § 1955*. The analogy is a limited one, however, and it is drawn for a limited purpose. For although 18 U.S.C. § 1955 resembles the continuing criminal enterprise statute, 21 U.S.C. §848, it differs from it in that conspiracy and/or the commission of substantive federal offences are not necessary elements of a violation of 18 U.S.C. §1955. In fact, the Supreme Court in Ianelli v. United States, __U.S. __, 43 L.Ed 2d 616 (1975) expressly held that the difference is critical. For it is clear that jeopardy on one of a series of crimes committed as part of single course of conduct is not jeopardy as to the rest, Mr. Justice Brennan's concurrence in Ashe v. Swenson, 397 U.S. 436 (1970) notwithstanding. There is so even when a course of conduct in a manner of speaking, is itself made a crime, albeit a crime separate and distinct from the crimes committed in its furtherance. Thus, for example conspiracy is an inchoate offense separate and distinct from the crimes which may be committed in order to achieve its goals. It is complete upon the making of an unlawful agreement,

*18 U.S.C. §1955 provides in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(b) As used in this section --
(1) "illegal gambling business" means a gambling business which
(i) is a violation of the law of a State or political subdivision in which it is conducted;
(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

and thus substantive offenses committed by the participants in order to achieve the objectives of the conspiracy share no elements in common with the conspiracy. See e.g., Pinkerton v. United States, supra; United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).

Such is not the case, however, in the context of a violation of the continuing criminal enterprise statute. For here, the graveman of the offense is conspiracy, together with the consummation of such a conspiracy through the commission of a series of criminal acts. Section 848 is specifically directed at large scale narcotics conspiracy; it reaches, in a word, "conspiracy plus".

Thus, in Ianelli v. United States, supra, where the Supreme Court held that conspiracy was not an element of a commission of a substantive violation of §1955, the Court accordingly held that a prosecution for both offenses may be maintained simultaneously. Prior to the decision in Ianelli, however, there existed a conflict in the Circuits on this very question. Thus, in the Seventh Circuit, where Section 1955 has been construed to require proof of conspiracy as an element of the offense, the Court of Appeals ruled that a prosecution for conspiracy to commit the offense could not be maintained. The Second, Third, Fourth and Fifth Circuits, however, had held that a conviction under section 1955 did not require proof of conspiracy, and thus held that the same defendant may be prosecuted for both. The cleavage between the majority and dissenting opinions in Ianelli was triggered by precisely the

same issue.

Because the pre-Ianelli decision on this question in the Seventh Circuit, United States v. Hunter, 478 F.2d 1019 (7th Cir. 1973), re-hearing denied, 478 F.2d 1019 (7th Cir. 1973), cert. denied, 414 U.S. 857 (1973), had held that conspiracy was an element of a violation of section 1955, and thus construed that statute in a manner required by the express language of 21 U.S.C. §848, it retains vitality for purposes of the present discussion. In Hunter the Seventh Circuit Court of Appeals affirmed appellant's conviction for a substantive violation of section 1955, but reversed his conviction for conspiracy to violate the same statute. Finding that the conspiracy with which the defendants had been charged was wholly incorporated into the substantive offense, the court held:

> [A] charge of conspiracy to violate §1955 may not be maintained if it comprehends nothing more than the agreement which. . . [the defendants] necessarily performed by the commission of the substantive offense itself. We think this conclusion is . . . consistent with the general rule that conspiracy is a crime separate from the individual substantive offense or offenses which the conspirators intended. . .which is not present in the completed crime . . . "Pinkerton v. United States, 328 U.S. 640,643. . . .
>
> United States v. Hunter, supra, at 1026

See also, United States v. Figueroda, 350 F.Supp. 1031 (M.D. Fla. 1972); United States v. Greenberg, 334 F. Supp. 1092 (N.D. Ohio 1971); United States v. Whitaker, 372 F. Supp. 154 (M.D. Pa. 1974).

In United States v. Becker, 461 F.2d 230 (2d Cir. 1972), however, the Court of Appeals implicitely found that conspiracy was not an essential element of a substantive violation of section 1955. Indeed, Becker had often been cited for this very proposition, See e.g., United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974); United States v. Bobo, 477 F.2d 974 (4th Cir. 1973) and to this extent, was correctly described as Ianelli made clear. Thus Becker found conspiracy and a substantive violation of Section 1955 to be separate offenses.

Moreover, neither Becker nor Ianelli turned upon double jeopardy considerations. The issue in Becker as in Ianelli was whether "Wharton's Rule"* prohibited the government from joining a conspiracy count to an indictment alleging a substantive violation of Section 1955. But there

*Wharton's Rule is a common law rule of merger, analogous to the doctrine that merges attempts with consummated offenses. The rule provides:

> When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such character that is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (i.e. which cannot take place without concert), we may mention dueling, bigamy, incest, and adultery, to the last of which the limitations here expressed has been specifically applied by authorative American courts. We have here the well known distinction between concursus necessarius and concursus facultativus--in the latter of which the occasion of a second agent, to the offense is an element added to its conception; in the former of which the participation of two agents is essential to its conception; and from this it follows that conspiracy, the gist of which is combination, added to the crime, does not lie for concursus necessarius. In other words, when the law says "a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name, it is not lawful for the prosecution to call it by some other name; and when the law says such an offense--e.g. adultery--shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting this offense as conspiracy.

Wharton, 2 Criminal Law §1339

is a "third man" exception to Wharton's Rule which provides that conspiracy will lie when more than the number of persons necessary to completion of the substantive offense are charged with conspiring to commit it. Thus, the Becker court concluded that while five persons were necessary for a substantive violation of Section 1955, seven had been indicted for conspiracy, and hence, the conspiracy count was good.

The validity of a double jeopardy claim, however, is in no way affected by the number of persons involved in different conspiracy indictments as United States v. Mallah, supra, makes very clear. The question in the present case is not, as in Becker or Ianelli, whether conspiracy merges with a substantive offense, but rather, as in Nielsen, whether a prior jeopardy on a substantive offense which necessarily included all of the elements of conspiracy and substantive offenses bars a later prosecution for those crimes.* Thus Becker is inapposite. United States v. Benter, 457 F.2d 1174 (2d Cir. 1972) upon which the Becker court relied, is equally inapposite because it too dealt solely with the question of whether Wharton's Rule merged conspiracy with a completed substantive offense. The Benter court, applying the "third man" exception, found that there was no merger. But common law merger is simply not the issue here.

Here, Vincent Papa has been in jeopardy for participating in a continuing criminal enterprise. The statute

*United States v. Hunter, supra, although also involving a Wharton's Rule issue, is nonetheless relevant because the Court's analysis of the problem turned upon an analogy to double jeopardy principles.

creating that offense, unlike 18 U.S.C §1955, requires proof not only of the commission of substantive offenses but of a conspiracy to commit these offenses as well. Thus the necessary elements of Count Five of the Eastern District indictment of Papa included the crimes charged against him in the present case. The government's admission that it would have made an offer of proof on this count of the $1,000,000. seized in February 1972 and the testimony of Joseph Ragusa establishing Papa's possession of the heroin charged in count two of the instant case shows that the crimes underlying count five of the Eastern District indictment would have involved the very same core conspirators, occupying the same roles, at the same time, in the same location, and reaping the same profits as was charged in the indictment upon which Papa has been convicted. Accordingly, the double jeopardy clause should have barred the prosecution of Vincent Papa on the indictment herein; his convictions thereunder must therefore be reversed, and the indictment dismissed.

B. PRIOR JEOPARDY ON THE EASTERN DISTRICT CASE: THE CONSPIRACY COUNT

The issue squarely raised here is whether count one of the Eastern and Southern District indictments of Vincent Papa charge genuinely distinct conspiracies or merely aspects or phases of a single criminal enterprise for which Papa may only be prosecuted once. How this issue is to be resolved was definitely addressed less than a year ago by this Court. Accordingly, this case is controlled by the decision in United States v. Mallah, 503 F.2d 971 (2d Cir. 1974)

In Mallah, the Court sustained co-appellant Vincent Pacelli's claim that he had been twice in jeopardy on facts similar to, albeit as more fully set forth below, less compelling than those presented in the instant case. The facts in Mallah were these:

Pacelli had previously been indicted and convicted for conspiracy, between January and June 1971, to violate the federal narcotics laws. Overt acts undertaken in furtherance of the conspiracy all took place within the City of New York. The proof established that Pacelli's co-conspirators were underlings in the scheme, but did not show the scope of the conspiracy beyond the overt acts alleged.

The Mallah indictment again accused Pacelli of conspiracy to violate the narcotics laws, this time between January 1971 and August 1973. All of the overt acts were different from those charged in the first Pacelli case but each nevertheless

occurred within New York City. The government's evidence revealed that Pacelli was at the core of a large-scale narcotics distributing network.

Similarly, in the present case, Vincent Papa has been twice indicted for conspiracy to violate the narcotics laws. In the Eastern District case, the government charged Vincent Papa, Anthony Possero, Anthony Loria and some twenty others of conspiring, within the Eastern District of New York, between April 1, 1967 and December 18, 1971, to buy, sell and otherwise distribute and facilitate the distribution and concealment of narcotics, contrary to law. The overt acts alleged to have been undertaken in furtherance of this conspiracy included numerous transactions in narcotics taking place between the Spring of 1967 and the Winter of 1971 at various places, including locations in Queens, New York and Bronx Counties in the City of New York. In its fifth count the indictment accused Papa, Loria and Possero, as well as two others, of engaging in a "continuing criminal enterprise" in that Papa, Possero, Loria and the others were alleged to have engaged in a continuing series of violations of the narcotics laws and to have derived substantial income from this illicit activity. Thus, the Eastern District indictment sketched, in broad terms, the outlines of a massive narcotics distributing empire in which Papa, Possero, and Loria were among the core conspirators.

In September 1972 Vincent Papa pleaded guilty

to the conspiracy count of the indictment in full satisfaction of that indictment and its predecessor and was sentenced to a term of five years in jail.*

In a like fashion, the proof adduced by the government at trial of the present case delineated a narcotics distributing network of enormous scale. Vincent Papa, along with seven co-defendants and some 28-odd unindicted co-conspirators, had been charged with conspiracy to violate the narcotics laws, this time in the Southern District of New York, and this time between December 1967 and the date of the filing of this indictment in 1974. Overt acts once again all occurred in Queens, New York and Bronx Counties. The government introduced proof that Papa possessed a suitcase containing $1,000,000. in cash in February 1972, within the scope of and in furtherance of the aims of this conspiracy. But this $1,000,000 was none other than the same $1,000,000 which the government intended to offer as proof of the continuing criminal enterprise in the Eastern District case. Thus, this ubiquitous comestible--what has been termed the "lubricant of the narcotics trade", United States v. Bynum, 360 F.Supp. 400, 419 (S.D.N.Y. 1973)--has now been claimed as having been the ill-gotten pelf of Papa's simultaneous participation

*Of course, the plea of guilty, accepted by the court in full satisfaction of an existing indictment (see annexed Exhibit "G", at) placed Papa in jeopardy on that indictment. See, e.g., United States v. Hallam, 472 F.2d 168 (9th Cir. 1973); United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1959), reversed on other grounds, 271 F.2d 487 (D.C.Cir. 1959); Rivers v. Lucas, 477 F.2d 199 (6th Cir. 1969).

in two separate, albeit simultaneously operating narcotics enterprises.*

Moreover, two of the core members of the Eastern District conspiracy are named as principals in this one, Anthony Possero and Vincent Papa. Anthony Loria did not appear on the list of co-conspirators in this case, but Loria was a co-defendant in United States v. Tramunti, supra, a case inextricably linked with this one. Joseph DiNapoli, a co-defendant there, was here an unindicted co-conspirator. Papa, defendant here, was an indicted co-conspirator there. According to the government, he was at the apex of an enormous narcotics merchandising enterprise, acting as supplier and source of huge amounts of narcotics, the very same role he was alleged to have played in the Eastern District and the present case. See, United States v. Tramunti, supra. Brief for the government on appeal, at 38-40. And the $1,000,000 seized from Papa in February 1972--the same $1,000,000, possession of which was an enumerated overt act here--was in fact introduced as evidence of the conspiracy in Tramunti. Thus, the Tramunti conspiracy and that charged in the present case are but two parts of the same whole and, accordingly, Loria is properly to be considered a part of the conspiracy made the subject of this prosecution.

Moreover, Count Two of this indictment charged that Papa and co-defendant Stanzione possessed 160 pounds of heroin

*The one million dollars was introduced by the government in United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975). The connection between the conspiracy alleged and proved in Tramunti and the one proved below is discussed infra.

in February 1972, a further indication of the enormous magnitude of the narcotics organization charged in this case.

Thus, both indictments charged massive conspiracies to violate the narcotics laws. Both named some of the same core conspirators occupying the same roles in the criminal heirarchy. Both conspiracies were alleged to have operated simultaneously from December 1967 to December 1971 and both were alleged to have operated in the same general geographical area. As United States v. Mallah, supra, makes absolutely clear, these facts more than conclusively demonstrate the identity of the two conspiracies alleged.

In Mallah, as against he identical claim of double jeopardy based upon similar but less compelling facts, the government urged that since there was no identity in the overt acts alleged, no common co-conspirators, and no identity in the temporal scope of the two indictments, the two conspiracies were distinct. This Court however, flatly rejected the arguments of the government that these were the relevant criteria by which to evaluate double jeopardy attacks against narcotics conspiracies. As the court pointed out, such conspiracies are of a special breed:

> One who deals in large amounts of narcotics is held to the knowledge that there is a large criminal organization which is making the deal possible, and one is liable as a co-conspirator even one has no personal knowledge of the identity of many of the co-conspirators. United States v. Bynum, 435 F.2d 490, 495 (2d Cir. 1973), vacated and remanded on other grounds, __U.S.__,42 U.S.L.W. 3646 (May 28, 1974); United States v. Arroyo, __F.2d __,slip opinion 2309 (2d Cir. March 22, 1974); United States v. Sisca, __F.2d__, slip opinion 3413, 3427-28 (2d Cir. May 10, 1974); United States v. Cirillo, __F.2d__, slip opinion 3297,3323-26

(May 7, 1974)...[T]he Bynum-Arroyo line of authority only reflects judicial awareness of the fact that the narcotics business generally takes the shape of a joint criminal venture among many criminals.

United States v. Mallah, supra, at 983.

Consistent with this view of the narcotics trade, the court was constrained to point out that the same sprawling conspiracy can be proved with a variety of combination of evidence. Thus, the court found the government's reliance upon a variation in the overt acts alleged to be misplaced:

> The essence of the charge is the criminal agreement to merchandise narcotics. The same agreement may be established by different aggregations of proof. Appellant [Pacelli] is hard pressed to show that he could have been convicted under the indictment below on the basis of the evidence introduced in [the first Pacelli case], when the overt acts specified in [that case] were distinct from the overt acts charged below. But because there are no doubt many overt acts which the government might have charged, a test measuring only overt acts provides no protection against carving one larger conspiracy into smaller separate agreements.

United States v. Mallah, supra, at 985.

Nor did the court find the lack of identity in the co-conspirators named in the two indictments to be of significance. Since both indictments alleged that the named co-defendants had conspired with "others to the Grand Jury unknown" the court concluded that the naming of different persons in different conspiracy indictments did not mean that there was no "overlap of personnel":

> [T]he proof below established that Pacelli was at or near the center of a large-scale, far-flung narcotics organization and therefore suggests the possibility that the others "unknown to the Grand Jury" in [the first Pacelli case] were members of the conspiracy proved below. Again, it is quite possible that prosecutorial discretion alone explains the distinctness of the overt acts alleged.

United States v. Mallah, supra, at 983.

And finally, since the temporal scope of the two indictments did overlap, at least to some extent, the court found the government's position in this regard to be equally non-persuasive:

> Neither are the dates of the two conspiracies truly distinct. Both were alleged to have commenced in January, 1971 and to have operated through May, 1971. The fact that both conspiracies were alleged to have operated in New York City, indeed that the overt acts were alleged to have taken place only a matter of a few miles from each other, strengthens the suggestion that the two conspiracies are really one. While New York City is large enough to harbor two simultaneous narcotics conspiracies, one of the two charged here is of a scale such that it is likely to have been known to those in the business in New York, and the participation of a core conspirator in that large operation in a series of narcotics transactions raises an inference that it is that large operation that is at work.

United States v. Mallah, supra.

Thus, this Court in Mallah, eschewed reliance upon the foralistic criteria suggested by the government. The Court clearly recognized that such factors (identity of named co-conspirators, identity of overt acts alleged, and temporal consonance) were matters too easily determined by the prosecutor, so that by carefully framing different indictment naming different defendants, acting in concert at different times, a single large criminal enterprise could be subdivided into several smaller ones.

Indeed, the government's eleventh-hour claim during pre-trial proceedings below that Anthony Possero "was unrelated to the Southern District conspiracy." (Gov't's Memorandum of Law, p.16, n.) is an apt illustration of this very point.

The government had originally named Possero as an unindicted co-conspirator in its Bill of Particulars. In response to the defendant's motion to dismiss on double jeopardy grounds, which focused in part upon the naming of Possero as an unindicted co-conspirator, the government claimed, as noted above, that Possero was an unimportant actor in the conspiracy. Yet the proof at trial demonstrated that Possero and Papa were laundering sums of cash through a White Plains bank with the assistance of Norman Young, placed Possero near the apex of the criminal hierarchy. While there was no evidence below that Possero was otherwise linked to the narcotics conspiracy charged in count one, the Eastern District indictment charged that Possero and Papa were engaged in a conspiracy and a continuing criminal enterprise, and thus alleged that both Possero and Papa occupied managerial or supervisory positions in a continuing scheme to merchandise narcotics. But one such enormous enterprise does not become too simply because the government, through intentional or unintentional limitations upon its proof, effectively decides to redact the name of the co-conspirator. The ease with which the illusion of non-identity can thus be created amply demonstrates why this Court in Mallah specifically and flatly rejected reliance upon formalistic criteria. The protection of the double jeopardy clause would be rendered nugatory if it were made to depend upon the "mere forms of criminal pleading." Short v. United States, 91 F.2d 614, 624 (4th Cir. 1937) cited with approval in United States v. Mallah, supra, at .

Rather because the criminal agreement to merchandise narcotics is the graveman of a narcotics conspiracy,

the focus of the double jeopardy inquiry, as this Court found in Mallah, is properly directed to the size and scope of the agreements alleged in the two indictments. Accordingly, this Court relied upon the following factors:

1. Location of the overt acts alleged in the indictment and proved during the trials;

2. Time during which the conspiracies were alleged to have operated;

3. Magnitude of the conspiracies;

4. Identity of "core" conspirators; and

5. Roles of "core" conspirators in the respective cases.

Applying these criteria to the case before it, the court found that

> ...the alleged two conspiracies occurred in the same general location at the same general time. One involved a large-scale narcotics ring; the known co-conspirators in the other transaction were foot soldiers. We know that a core member of the large-scale operation participated in both transactions, and that the narcotics business is such that it is likely that the foot soldiers were backed up by a larger organization. Moreover, Beverly Jalaba, one of the foot soldiers in [the first Pacelli case] was Pacelli's mistress; so close to Pacelli it is also likely that she was close to his organization.

United States v. Mallah, supra, at 985-86.

The instant double jeopardy claim is even more compelling. Application of the criteria announced in Mallah to the facts present here shows conclusively that the government has here simply bifurcated a single, continuing conspiracy, and thus now seeks to place Papa in jeopardy a second time for the same offense.

1. Location of the Overt Acts Alleged in the Indictments

Here, as in Mallah, the two conspiracies are alleged to have occurred in the same general location. Both indictments allege overt acts taking place within New York, Queens and Bronx Counties and neither indictment alleges an overt act occurring outside the Metropolitan area. Thus, the locus delicti of both conspiraices is the same. Of course, it makes no difference that the indictments in the present case were brought in different districts. Legislative subdivision of the City of New York into two separate federal jurisdictions hardly makes one conspiracy two. Quoting from Short v. United States, supra, the Mallah court noted:

> If the government sees fit to send an indictment... charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy...is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed...the constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.

Short v. United States, supra, at 624, cited in United States v. Mallah, supra, at 985. (Emphasis added)

2. Time During Which The Conspiracies Were Alleged To Have Operated

According to the indictments in the present case, both conspiracies operated simultaneously within the same geographical area for a period of four years, December 1967 to December 1971. Indeed, all but the first eight months of the Eastern District

conspiracy are wholly absorbed within the temporal framework of the present case. This may be contrasted with the chronological overlap of just five months in Mallah, which, nevertheless, was considered to be a significant index of identity. United States v. Mallah, supra, at 5494, 5499, 5501.

3. Magnitude of the Conspiracies

In Mallah, only one of the two conspiracies was shown to be of large scale; the evidence in the first Pacelli case gave no genuine indication as to scope. Here, both conspiracies are charged on a grand scale. Both involved more than a score of individuals in narcotics merchandising schemes transpiring over more than four years. The Eastern District case included the charge of operating a continuing criminal enterprise against five co-conspirators, grim evidence of the government's view of the magnitude of the conspiracy in that case; the present case involves not only three of those so charged, but also possession by two co-defendants of 160 pounds of heroin. Both involve the participation of Vincent Papa, alleged by the government in Tramunti to be the supplier of narcotics to that large-scale organization.

4. Identity of co-conspirators

In Mallah, only Pacelli was common to both indictments. Here, there is a substantial overlap of personnel. Anthony Possero, a co-defendant with Papa in the Eastern District case, is a co-conspirator here. Anthony Loria, a co-conspirator and, with Papa and Possero, a co-defendant in the continuing criminal enterprise count in the Eastern District case, was a

co-conspirator with Papa and Joseph DiNapoli (also a co-conspirator in the present case), in United States v. Tramunti, supra. As noted above, the very same $1,000,000 the government used to show Papa's participation in this conspiracy was in fact used to prove the conspiracy in Tramunti. Papa and Possero two of the five individuals charged with operating a continuing criminal enterprise in the Eastern District indictment--and hence, of being core conspirators in that case--were here alleged to have been part of the conspiracy charged in the present case. Ant three individuals--Papa, Loria, and Possero--all of whom were core co-conspirators in the Eastern District operation are related to the conspiracy charged and proved below.

5. Roles of Core Conspirators in the Respective Cases

Particularly compelling is the fact that the roles of the overlapping co-conspirators are identical in each indictment. Papa, Possero and Loria,* by the government's allegations, were not only participants in the Eastern District case, they were at the very heart of it. All of them, moreover, according to the proof in Tramunti and below occupied the same position within the criminal heirarchy. Papa was the source and supplier of narcotics; Possero and Loria were distributors at the very highest level of the Papa organization.

In Mallah, the Court of Appeals assigned great significance to the overlap of but one conspirator--Pacelli--and

*Loria is, for the purposes of this argument, treated as if he were a defendant in the present case. For it is clear that Tramunti and the present case each contained parts of a single whole. Papa's role as overall head and supplier in both cases and the fact that the same million dollars worth of narcotics

to the fact that but one of the conspiracies alleged was a major narcotics enterprise, even absent any showing of the role played in each case by this single common conspirator. The overlap of a single core individual was enough. For it was likely that those who had conspired with Pacelli in the first case were aware of his large organization, operating at the same time, which was made the subject of the second prosecution. That being so, by conspiring with Pacelli, they had willfully made themselves part of that organization. Here, not one but three core conspirators are identical in the two cases. Here, not one, but both conspiracies were alleged to be operating simultaneously not for five months, but for four years. The facts of the present case not only track those of Mallah, they go several steps beyond. Clearly, the standards laid down in Mallah are more than met in the present case. It is clear then, that the two conspiracies charged in this case and in the Eastern District indictment are but fragments of a single narcotics conspiracy. Vincent Papa has already pleaded guilty to participation in that enterprise. He may not now be placed in jeopardy again for that offense. Accordingly, his conviction for conspiracy on the first count of the indictment must be reversed and that count of the indictment dismissed.

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cont'd
transactions were claimed by the government to have been embraced within the ambit of both conspiracies makes this abundantly clear. It is true, of course that Papa was not a co-defendant in Tramunti, but this fact is of no moment; Papa's double jeopardy claim derives from his initial jeopardy on the Eastern District indictment. Rather, Tramunti must be seen as a "bridge" linking the Eastern District case with this one.

POINT III

THE COURT ERRONEOUSLY PRECLUDED THE DEFENSE FROM ESTABLISHING, BY CROSS-EXAMINATION OF THE WITNESS SALVIMINI, THAT THE SOURCE OF SUPPLY FOR THE DRUGS RAGUSA, HAMILTON AND BAIARDI SOLD TO SALVIMINI WAS NOT VINCENT PAPA

It was the government's position, based on the testimony of Ragusa, that the heroin sold by Ragusa, Hamilton and Baiardi to Agent Salvimini on March 16, 1972 came from the two suitcases which Papa had stashed with Ragusa. Indeed, this was the only testimony directly inculpating Papa in an actual consummated narcotics transaction. In an effort to contradict this critical testimony, the defense elicited from Salvimini on cross examination that Hamilton had told Salvimini that his major source of supply was from Virginia. Furthermore, Agent Salvimini's status reports showed that Baiardi told him that Ragusa and Hamilton had actually traveled to Virginia in order to obtain heroin to sell to Salvimini. The court, however, although permitting Salvimini to relate statements by Hamilton and Ragusa to Salvimini concerning their source of supply, refused to allow Salvimini, on hearsay grounds, to relate Baiardi's statement to him concerning Ragusa and Hamilton's trip to Virginia to obtain narcotics. This ruling was erroneous, and prevented the defense from submitting important evidence to the jury showing Ragusa's untruthfulness on perhaps the central factual issue in this case.

Initially, it is clear that Ragusa, Hamilton and Baiardi were members of a joint venture to sell heroin to

undercover Agent Salvimini. Together they engaged in negotiation setting the price, actually sold heroin, and engaged in further negotiation for additional sales of the drug. Baiardi, in fact, actually took the money from Salvimini, procured the drugs, and gave the heroin to Salvimini. Baiardi was the contact who Salvimini would talk to when he wished to speak to Ragusa and Hamilton. Salvimini, in short, described Baiardi as working for Ragusa and Hamilton, and described them as Baiardi's "People". There can thus be no doubt that the three were members of a joint venture for the sale of heroin, and, thus, that the declarations of acts of any of them would be admissible against any or all of them. As Judge Hand stated the rule in United States v. Pugliese, 153 F.2d 497 (2d Cir. 1946):

> "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all."

(Id. at 500). See also, United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961); United States v. Jones, 374 F.2d 414 (2d Cir. 1967)

Furthermore, there is no doubt that Baiardi's statement to Salvimini that Ragusa and Hamilton traveled to Virginia to obtain heroin was in furtherance of their joint venture, since it assured the purchaser that sources for drugs were available, and that the principals were making every effort to obtain the drugs for Salvimini, even to the point of personally traveling out of the state to make their deal a viable one. It therefore was illogical to admit hearsay statements of Hamilton and Ragusa to Salvimini on the one hand, but preclude the same sort

of statements by Baiardi to Salvimini on the other. Baiardi's statements, under Pugliese, are competent proof against Hamilton and Ragusa. Certainly if all three had been indicted together for conspiracy to sell the heroin to Salvimini, Salvimini, beyond the shadow of a doubt, could testify about Baiardi's statement to him to establish that Ragusa and Hamilton did travel to Virginia to obtain drugs from their supplier there in furtherance of their joint venture or conspiracy.

In United States v. Puco, 476 F.2d 1099 (2d Cir. 1973) an agent testified that one of the defendants (Gonzales) pointed out Puco to him and stated that Puco was a supplier. In rejecting a defense argument that Gonzales should have been called to give this testimony, instead of the agent, the court simply observed that though the testimony was hearsay, it was admissible against Puco because Gonzales was a co-conspirator and the statement was made in furtherance of the conspiracy. See also Lutwak v. United States, 344 U.S. 604, 617 (1953). Indeed, the court even held that the Confrontation Clause problems did not bar this testimony since the statement identifying the supplier was made with "indicia of reliability". Here, there are, of course, no Confrontation Clause problems with regard to evidence against non-defendants Ragusa and Hamilton and furthermore, there were also "indicia of reliability" to support the truthfulness of Baiardi's statements. Baiardi had no motive to falsify when he told Salvimini about Hamilton and Ragusa's trip to Virginia; Hamilton had already told Salvimini that he had a source of

supply in Virginia,* and heroin had already been delivered to Salvimini, indicating that there was in fact a source of supply. See also, United States v. Kaplan, 510 F.2d 606 (2d Cir. 1974) rehearing denied, 510 F.2d 606 (2d Cir. 1075).

In United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961) a witness had testified that his father told him that he received a call from Annunziato requesting money for a specific project and that he had agreed to send it. The court held this testimony admissible to prove the fact of the request as well as the subsequent delivery. In the present case, Baiardi's statement that Hamilton and Ragusa traveled to Virginia to obtain drugs was similarly admissible. As in Annunziato the event in question was recent, was within the personal knowledge of the declarant and, since Baiardi also alleged that future shipments of heroin would be obtained, was integrally connected with the whole transaction as to make it relevant and probative.

Thus, since under Pugliese, Puco and Annunziato Salvimini could easily have acknowledged on the stand what was already in his report concerning Baiardi's statement, and since that statement was admissible as one made by a joint venturer or co-conspirator in furtherance of the common scheme existing among Baiardi, Ragusa and Hamilton, the court should have permitted

*The fact that there was testimony indicating that Virginia was a source of supply does not render the offered testimony about the trip to Virginia cumulative. An actual trip there bolsters the credibility of the source actually existing in Virginia. By the same token, it tends to negate the possibility that the joint venturers were simply lying to the agent in order to conceal the real source. For if they really obtained the drugs in New York, as the government claimed, there would be no reason to undertake the trip to Virginia.

it. Indeed, by not allowing the statement in evidence, the defense was deproved of a significant piece of evidence tending to establish that the defendant was not the source of supply for the heroin.

POINT IV

THE CONSPIRACY CONVICTION, INSOFAR AS IT WAS BASED ON AN OLD LAW (21 U.S.C. §174) VIOLATION IS INVALID SINCE IT WAS OBTAINED IN THE ABSENCE OF A CHARGE SETTING FORTH ALL THE ELEMENTS OF THE OLD LAW CRIME. ACCORDINGLY, THE CONVICTION ON COUNT I SHOULD BE VACATED OR, ALTERNATIVELY, THE CASE SHOULD BE REMANDED FOR RESENTENCING UNDER THE NEW LAW ALONE

In United States v. Llanes, 374 F.2d 712 (2d Cir. 1972) the court held that 21 U.S.C. §174 required proof of four elements: "(1) doing one of the physical acts limned in the statute, (2) doing such an act 'fraudulently or knowingly', (3) illegal importation of the narcotic drug and (4) knowledge of the illegal importation." Id. at 715; see also, United States v. Peeples, 377 F.2d 205 (2d Cir. 1967). Thus, in United States v. Massiah, 307 F.2d 62 (2d Cir. 1962), the Second Circuit specifically held that it was reversible error for trial court to fail to charge the elements of illegal importation and knowledge of illegal importation in a conspiracy to violate 21 U.S.C. §174. See also, United States v. Baratta, 397 F.2d 215 (2d Cir. 1968). Indeed, in Massiah the court reversed even in the absence of a defense request or objection, since it is simply plain error under Fed.R. Crim.P. 52(b) to neglect to charge necessary elements of a crime.*

*In Baratta, the same error was held not reversible in the absence of an objection because the judge had charged the elements of illegal importation and knowledge of illegal importation as to an old law substantive count upon which the jury also convicted. Here, of course, the substantive count was a new law count, and the importation and knowledge elements did not have to be, and were not, charged.

In the present case, counsel pointed out that these elements must be charged, even citing Massiah specifically (Tr. 1619). The court, however, never told the jury at all that illegal importation and knowledge of illegal importation were elements of the crime.* Thus, the conspiracy conviction, insofar as it is predicated upon a finding of guilt for violation of the old law crime,** must be vacated, since the necessary elements of that crime were never charged to the jury. United States v. Massiah, supra.

The invalidity of the old law conviction carries with it two important ramifications. First, it requires that the conspiracy count verdict be vacated in its entirety. For in the abdence of a correct charge, there is no way to determine by what manner the jury arrived at its final verdict, or how consideration of the old law crime (which the court instructed the jury it should consider first, Tr.1601) infected consideration of the new law crime. For instance, if the jury reached a verdict of guilty on the old law in the absence of a charge requiring it to assess all the necessary elements of that crime, it might well have carried over its incomplete determination in a more or less

*While the indictment, which was read to the jury in the charge (Tr. 1604-5), mentioned that the narcotics were illegally imported, and while the court mentioned knowledge of illegal importation as an object of the old law conspiracy (Tr. 1600), it was never explained to the jury that there were essential elements of the crime which must be proved beyond a reasonable doubt before a conviction could be found.

**The jury rendered a verdict of guilty on Count 1, finding that the defendant committed the crime both before and after May 1, 1971 (Tr. 1727).

a fortiori manner to conclude that the defendant was also guilty under the new law. Similarly, if the jury had concluded, after submission of proper instructions, that knowledge of illegal importation was unproven, (as might well be the case since there was no evidence of illegal importation or knowledge of it and not even the presumption of knowledge was charged), a verdict of not guilty under the old law could well have influenced the jury's view of the evidence relating to post-May 1, 1971 events (cf. United States v. Spock, 416 F.2d 165, 180-3 (1st Cir. 1969) Consequently, since the jury's verdict was rendered without full and complete instructions with regard to one of its major determinations, the verdict on Count 1 should be vacated. See, Stromberg v. California, 283 U.S. 359 (1931); North Carolina v. Williams, 317U.S. 287 (1942); Yates v. United States, 354 U.S. 298, 311 (1951); Street v. New York, 394 U.S. 576, 585-8 (1969).

In any event, if Count 1 is not vacated in its entirety, the defendant may only be sentenced under the new law provisions.* For while it is possible to sentence a defendant under the harsher old law where the indictment charged both old and new law violations (see, United States v. Kella, 490 F.2d 1095 (2d Cir. 1974), such a sentence was inappropriate here because that part of the conviction based on old law violations was rendered in the absence of the required charge setting forth all the elements of the old law crime.

*Papa, here, was sentenced under the old law on his conviction on Count One to a term of twenty years imprisonment.

POINT V

$967,450 IN CASH, SEIZED FROM VINCENT PAPA ON FEBRUARY 3, 1972, SHOULD HAVE BEEN SUPPRESSED.

The seizure of nearly one million dollars in cash from Vincent Papa and Joseph DiNapoli in the Bronx on February 3, 1972 has already been fully litigated before this Court in another case. See, United States v. Tramunti, 513 F.2d 1087, 1100-1105 (2d Cir. 1975). Appellant herein raises the issue solely for the purpose of preserving it should he ultimately seek certiorari in the Supreme Court of the United States.

CONCLUSION

FOR THE REASONS STATED IN POINTS ONE AND TWO HEREIN, APPELLANT'S CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED. ALTERNATIVELY, FOR THE REASONS STATED IN POINTS THREE AND FOUR HEREIN, THE APPELLANT SHOULD BE GRANTED A NEW TRIAL, OR, IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FOR RE-SENTENCING.

Respectfully submitted,

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